



turn back the toxic tide

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## **BAN COMMENTS on THREE SWISS-INDONESIAN COUNTRY LED INITIATIVE (CLI) DOCUMENTS:**

- **Concept Note**
- **Analysis of Reasons for Transboundary Movement**
- **Way Forward Document**

-- PART 1 --

7 May 2010

### **I. Introduction**

In this review, produced in two papers, BAN reviews three of the seminal documents of the Swiss-Indonesian Country Led Initiative to date. In this first paper (Part 1) we provide the context and background of the situation giving rise to the Country Led Initiative idea. Then we summarize our concerns identified in the three documents. Finally we provide recommendations of a true way forward for any country led or other initiative that may wish to work to implement and achieve the objectives of the Basel Ban Amendment.

In the second paper (Part II, at [www.ban.org/Library/CLIRewiew\\_BAN\\_Part2.pdf](http://www.ban.org/Library/CLIRewiew_BAN_Part2.pdf)) we provide detailed annotated versions of the three papers from which the summary concerns in the first paper were derived.

### **II. Executive Summary**

Despite the admonition of the Indonesian President in his statement adopted at COP9, that the Country Led Initiatives (CLI) efforts should not seek an “alternative” to the Basel Ban Amendment but rather find complementary ways to achieve its objectives while expediting its entry into force, the Swiss-Indonesian CLI is unfortunately off on the wrong foot, largely doing the opposite of what was called for. Its failing rests in part by relying on faulty data, while wrongly presuming that the objective of the Ban was simply to prevent unwanted wastes from going to vulnerable countries. That was, in fact, the objective of the Basel Convention itself. The Ban is meant to achieve much more than that, including internalizing costs, driving clean

production upstream, and preventing developing countries from bearing a disproportionate burden of environmental harm simply due to economic status.

As a result, the “Way Forward” paper currently unfortunately reads very much like a “Way Backwards”, calling for turning back the clock and reverting to implementation of the 1989 Basel Convention itself, or calling for ESM facility standards, and not standards which would include the Basel Ban.

Finally, and most glaringly absent, are proactive proposals to actually do the job of bringing the Ban into force at the earliest possible date, precisely what the President called for. While there are some worthy ideas for improving implementation of the Basel Convention itself, unless dramatically altered both in substance and in process (allowing observers to participate), the CLI seems to have become a new tool seized upon by detractors of the Basel Ban, intent on creating alternatives to it, rather than an instrument for its promotion and implementation as originally conceived.

### **III. Background**

At COP9, the Parties to the Basel Convention grappled with the question of entry into force of the Basel Ban Amendment. After 62 ratifications, many believed that the amendment would have achieved sufficient ratifications for entry into force or be nearing that milestone. After all, the Convention itself required but 20 ratifications to enter into force. Further the language of Article 17, paragraph 5 spoke of  $\frac{3}{4}$  of the Parties having accepted the amendment and  $\frac{3}{4}$  of the number present in 1995 when the Decision to amend the Convention was adopted was in fact 62 countries.

However, it was discovered that the language of Article 17 paragraph 5 describing how amendments come into force was unclear. Unfortunately, this ambiguity was seized upon by the detractors of the Ban Amendment as a new opportunity to scuttle the overwhelming will of the global community that twice passed the ban by consensus decisions in 1994 and 1995. It was not a case of these few detractor countries, which include the United States, Canada, Japan and India, believing that amendments generally should be very, very difficult to achieve, rather they were willing to create a Herculean task for entry into force of any amendment simply because they did not like the one at hand – the Basel Ban Amendment. They were willing to sacrifice the viability of the Convention’s amendment process to ensure that the Ban Amendment did not go into force, at least not in this century. Unfortunately that is because there remains vast amounts of money to be made or costs avoided in continuing to allow developing countries to be the repository of externalized real costs associated with environmentally sound management of hazardous wastes.

At COP9, then, the issue was not resolved. While the Parties knew that the interpretation of Article 17 was in their hands, the question of how to resolve that issue was inconclusive following the COP9 debate over whether the decision would be one decided by the rules of procedure (allowing for a vote with a  $\frac{3}{4}$  majority prevailing) or, by consensus. If decided by consensus, it is expected that the best version of Article 17 that could be achieved would be to only allow entry into force when  $\frac{3}{4}$ ths of the *current number of Parties* ratify the amendment. Currently, there are 68 Parties having ratified the amendment. If we were to allow the “current time” approach, a total of 130 Parties would be needed. As it has taken 15 years to achieve 68, a hurdle of 130 is seen as nothing more than a blatant attempt to relegate

the Amendment to a relic of history. The alternative of course, is to use some version of the “fixed time” approach, which the Convention appears to have clearly indicated was the intent, by use of its phrase, “Parties having accepted” (the amendment). The fixed time approach, of course, is the reasonable choice. This would no doubt be the choice if and when the Parties vote on the proposition by the Convention’s normal rules of procedure. However, as we know, COP9 ended without a vote being taken. Instead, a draft decision was deferred and the President (Indonesia) made a statement calling for efforts to be made in country led initiatives to:

*“...launch a process, on the august occasion of the ninth meeting of the Conference of the Parties, which will reaffirm the objectives of the Ban Amendment and explore means by which these objectives might be achieved. The President stresses that this initiative should serve to complement, and most certainly should be without prejudice to, the continuing efforts by Parties to ensure the entry into force of the Ban Amendment.*

*To this end, the President calls upon all Parties to the Convention to expedite ratification of the Ban Amendment, so as to facilitate its entry into force, which will allow the achievement of the objectives of the Amendment...”*

The President did not seek to replace the Basel Ban Amendment or find alternatives to it, but rather to find activities that would facilitate it or complement its objectives..

To date, while the President called on the Parties for initiatives (plural), only one such initiative has been launched that we are aware of, and it is the Swiss-Indonesian Country Led Initiative (Swiss-Indonesian CLI). Further, while the President did not limit the participation of such initiatives, this Swiss-Indonesian Initiative chose to lock-out participation by non-Parties, including NGOs and other observers. In our view, this is an extremely unfortunate decision

and already it is clear that by preventing key sources of information, the Swiss-Indonesian CLI has gotten off on very much the wrong foot in terms of their analysis of the current global situation. Apart from what in our view is a dangerously flawed analysis of the current status of waste trade, we are observing that the CLI does indeed seem intent on offering up *alternatives* to the Basel Ban Amendment, and is *not* embarking on the kinds of efforts suggested by the President in his Statement that would enhance the implementation of the Ban and its many important objectives.

## **IV. Concerns Regarding the Swiss-Indonesian CLI**

### **Observers Inappropriately Locked Out**

There are times during heated negotiations on legal text where it may be appropriate to remove observers from the room and only allow Parties to negotiate text. The Country Led Initiative idea as proposed by the President at COP9 is not one of those times. Indeed, the idea conceived rightly should involve an open sharing of information between all stakeholders. Already the process has suffered greatly from lack of transparency and inclusion. Data has been missing from the trade analysis that could have been provided by NGOs for example. Policy references and historical

information also seem to be lacking, apparently as the result of the Parties present not having a complete institutional memory of the Ban Amendment, its evolution and information about its policy basis. Further, lack of transparency does not allow for a free exchange of ideas during the meetings, leaving critical comments to have to be presented as a protest (such as this one) only after papers have already been completed. Finally, lack of transparency simply leads to suspicions as to whether certain key players' perspectives are not to be taken seriously by design. It is not too late to open the door of this process to all observers. It is a brainstorming, idea-generating process, not a tense negotiation of legal text.

### **Lack of Real Data Leads to Faulty Analysis**

The Swiss-Indonesian CLI made an error in drawing significant conclusions based upon the flimsiest of data. They unfortunately used the Basel Convention Country Reporting data of 2005-2006, which only draws from information from 47 countries and only from data provided through the legal prior informed consent process. The problems with this data are serious and multiple:

- 1) Only 47 of 173 Parties are reporting, that is, only 27% of Parties.
- 2) Those that are reporting are vastly skewed toward the Annex VII group (74% of total were Annex VII), which behave very differently with respect to waste trade than non-Annex VII (26%).
- 3) The data is 5 years old. The global waste trade, particularly post-consumer waste, appears by anecdotal data to have increased significantly in the last 5 years.
- 4) The data is only from Parties, when in fact one country, the world's largest waste producer - the United States, is not included, skewing the results dramatically.
- 5) Worse, that which is being reported is only data on *legal, reported trade*. There exists a huge illegal trade by all anecdotal evidence. It is staring us in the face. The widespread illegality is due to many reasons, including lack of inclusion of US as a Party, mislabeling of shipments, lack of enforcement, lack of appropriate implementing legislation, and confusion regarding Convention application. In particular, we are talking about post consumer wastes such as electronic wastes which are largely exported illegally. Further, we are not aware that toxic ships are being reported, despite the Parties stating that ships can be hazardous waste. These two waste streams alone, electronics and obsolete vessels, make up most of the currently traded tonnage according to the anecdotal evidence before our eyes, but these waste streams are not captured by the legal PIC reporting data.

Taking all of these together (and the multiplying effect of combined erroneous data), it is certain that the data gathered by the SBC reporting mechanism for the analysis undertaken is fatally flawed to use to understand global waste trade today. Furthermore, unfortunately it is known that there is no reliable data available to draw from. This is largely due to the fact that the Harmonized Tariff System does not designate specific tariff codes for most wastes, including hazardous and other wastes as defined in the Convention. However it is also suspected that even if such codes

were to exist, there would nevertheless be a great incentive to mischaracterize shipments. Such mischaracterizations are already very common.

In sum, using the 2005-2006 SBC country reports will lead to far more erroneous assumptions than dispensing with it altogether and relying on anecdotal, enforcement, and journalistic evidence. For example, the notion that there is more trade taking place between non-Annex VII countries than there is moving between OECD and non-OECD countries is sadly and dangerously misguided. In our visits to India, China, Nigeria and Ghana, we have seen zero evidence of wastes arriving from other non-OECD countries. It may exist, but the mountains of waste arriving from Annex VII countries are not matched by even hills of waste from non-Annex VII countries.

### **Swiss-Indonesian CLI Presupposes Objective/s of Basel Ban Amendment**

Some of the most dangerous points of departure for the Swiss-Indonesian CLI are the assumptions of just what the objectives of the Basel Ban Amendment are. These assumptions dictate the entire thrust of the Swiss-Indonesian exercise, resulting in a flawed foundation for the entire effort. These assumptions are found in the very title of the Analysis document (“Analysis of reasons for the transboundary movement of hazardous wastes where environmentally sound management cannot be ensured”, and are assumed wholesale in the “Concept” Document and the “Way Forward” Document as well.

The Basel Ban Amendment has more than one vital objective and this has always been the case; yet most of these are not recognized in the Swiss-Indonesian CLI. While Decision III/1 cites a proposed preambular paragraph as follows, *“Recognizing that transboundary movements of hazardous wastes, especially to developing countries, have a high risk of not constituting an environmentally sound management of hazardous wastes as required by this Convention”*, this cannot be concluded as the sole objective. Further, the normal interpretation of environmentally sound management (ESM) while defined broadly in Article 2 of the Convention, is defined in the Swiss-Indonesian CLI as seeming to only encompass technological capacity, and most often only on a facility basis.

In fact, there are very important objectives of the Basel Ban that are not being discussed in the Swiss-Indonesian ESM context, even though they absolutely should be. The primary objectives that have been noted in past policy discussions include:

**Objective:** To protect developing countries from direct environmental harm from a lack of adequate technical waste management capacity. This is the most commonly recognized objective of the Basel Ban, but it is by no means the only objective and too often it is confined to simply considering the technology of a receiving recycling or disposal facility and not capacity in the societal context to provide infrastructure and safety nets to support the technology of the facility. It is a fact that there are very few proper facilities in developing countries for hazardous waste management, and this results in a great transfer of harm when wastes are allowed to be exported from developed to such developing countries. But there are even more situations where even if a state-of-art facility were placed in a developing country, it would not be able to be maintained or supported to achieve ESM. Thus, in these situations,

certifications or standards of operation for individual facilities will not ensure ESM.

**Objective:** To create a legally binding obligation on Annex VII countries to prevent exports of hazardous wastes to developing countries. Decision II/12 (1994), which called for a ban without an amendment, was deemed thereafter to be insufficient. So clearly a major aspect of the objective of III/1 was to have a legally binding obligation. And it is very important to note that the construction of the Ban Amendment (Decisions II/12 and III/1), unlike Decision I/22 (1993) which called on developing countries to ban imports from developed countries, was to place the onus for eliminating the damaging trade on developed (exporting) countries. The clear objective then of Decision III/1 was to place the obligations on potentially cost-externalizing exporting countries (Annex VII) and none, in fact, are placed on non-Annex VII countries. Therefore, to be consistent with these known objectives, the CLI should not find “alternatives” that are not legally binding, nor place the burdens to control waste trade onto the developing countries. Too many of the Swiss-Indonesian CLI proposals do just that. To date 32 of the 39 Annex VII countries have in fact implemented this ban, meaning that contrary to the belief of some, the ban already is a remarkable success story and precedents have been set, indicating a likelihood of even more Annex VII responsibility in future.

**Objective:** To prevent developing countries from bearing a disproportionate burden of harm from production and hazardous waste globally. As mentioned earlier, even if the technology in a developing country is state-of-art at the facility level, there is considerable potential to transfer harm and considerable opportunity to utilize trade to externalize costs to workers, communities and ecosystems in developing countries. This is due to the fact that even state-of-art facilities cannot mitigate all harm and risk even in the best of scenarios, and in developing countries, due to the relative lack of resources and the commensurate lack of infrastructural, legal and other support mechanisms needed to support hazardous waste management technology, ESM is highly unlikely. Given the above reality, together with the known lower-wage conditions of developing countries, these countries become cost-dumping havens and therefore receive a globally disproportionate burden of externalized costs or environmental harm. What is not recognized enough is that there is a clear linkage between low-wages and opportunities to externalize environmental and health costs, as both are a function of a society's wealth and both are key drivers for the movement of wastes across the globe. The opportunities for cost externalization that can take place outside the factory gates and lead to non- environmentally sound management from cradle to grave include lax regulations, monitoring or enforcement of environmental and occupational health and safety rules, as well as lack of infrastructure, perhaps for downstream hazardous residual management, support and safety nets for identifying and treating occupational disease, emergency response, medical expertise in treating toxic exposures, etc.

Sadly, due to cost externalization and cheap labor being closely linked, the most environmentally harmful segments of a product's entire lifecycle increasingly take place in developing countries. For example, with electronics,

developing countries now are the locations for the highly polluting and environmentally damaging minerals extraction phase, the commodity production (ie. from ore to bullion) phase, the manufacturing phase, as well as the waste phase. The only relatively clean phase in the lifecycle of electronics – its actual use (e.g. of our computers on our desks) – takes place in all regions of the world, but increasingly is the only phase that takes place exclusively in developed countries.

This horrible pattern of disproportional burdening of developing countries with environmental harm takes place because cheap labor and cost externalization opportunities are inextricably linked. As long as weaker economies are not protected by global obligations preventing cost externalization, such as through cost internalizing instruments like the Basel Ban, developing countries will continue to be exploited and the victims of the environmental injustice of bearing a disproportionate burden of global environmental harm simply due to economic status. This disproportionate discrimination is a human rights violation which the Basel Ban prevents as one of its key objectives. The Swiss-Indonesian CLI fails to speak to this issue and in fact proposes “remedies” that would inappropriately link export to facility based standards.

**Objective:** To fulfill the Basel Convention obligation for national self-sufficiency in waste management. In Article 4.2.b, the Basel Convention calls on all Parties to: *“ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal.”* This is known as the national self-sufficiency principle and it calls for all countries to prevent the export of hazardous wastes to the extent possible by providing appropriate technologies domestically. While not every country in the world is able to achieve full self-sufficiency, certainly the case can be made that Annex VII countries can be the first group of countries that can ensure the availability of adequate disposal facilities. If they do not have them, they can certainly provide them. However, such technological capacity may not be provided domestically in developed countries if it is simply left to the free marketplace. The Ban Amendment compels developed countries to develop markets at home for wastes and thus internalizes costs more appropriately while providing incentives for cleaner production. The Ban Amendment then, simply implements the Basel Convention’s self-sufficiency obligation in a more legally binding manner for at least this first tier of well-resourced developed countries. The Swiss-Indonesian CLI seems to too often ignore placing responsibility on Annex VII countries to minimize transboundary movement through national self-sufficiency.

**Objective:** To provide an incentive for upstream waste prevention, green design, clean production and cost internalization. All experts agree that the most serious, appropriate solution to the waste crisis is prevention of wastes upstream, at source, in both a quantitative (i.e. less volume) and qualitative (e.g. less toxic) way. However, there will never be an incentive to internalize or eliminate costs and liabilities at source as long as such costs can be externalized via the pathways of globalized trade – making somebody else other than the responsible manufacturer and consumer pay the bill. Cost

internalization through green design and clean production is *the* solution to the waste crisis, and the Basel Ban Amendment provides an obvious, powerful cost internalizer in an age of cost-externalization made possible by free trade to weaker economies. Costs internalized will translate into toxics use reductions, and design-for-recycling – the most direct and economically efficient, just, and sustainable pathway to solving the hazardous waste crisis. These benefits will only be achieved by ending the incentive for cheap and dirty dumping. The analysis by conducted under the Swiss-Indonesian CLI tends to overlook these positive impacts and their economic and environmental benefits to all.

### **Swiss-Indonesian CLI’s “Way Forward” Paper: Makes Proposals that Undermine the Amendment while Failing to Make Proposals to Actually Facilitate its Entry into Force**

Deriving much of the proposed conclusions on faulty data and false assumptions about the true objectives of the Basel Ban, the Way Forward document proceeds to propose ideas that will not so much complement the Basel Ban Amendment entry into force effort as they will undermine it.

Part of what may be driving this very unfortunate direction is an incorrect notion that the Basel Ban Amendment is somehow at an insurmountable impasse and thus *anything* else must be considered irrespective of how it will impact the amendment process. But this was not the conclusion of the Indonesian President in his statement, and it is not the intent of the CLI idea. Further, this hopeless attitude is absolutely unwarranted.

First, the Basel Ban Amendment can easily enter into force simply when a country or group of countries calls for a vote on the question of interpretation of Article 17. Clearly, the Parties never envisaged a “current time” approach requiring 130 ratifications or more to have an amendment enter into force. Such a conclusion achieved now simply because a handful of countries do not like the ban, would forever defeat the future opportunities of the Convention to be amended. Most countries understand that, and most countries favor the Amendment in question by an overwhelming majority in any case. Countries seeking a current time approach are not likely to number more than 10 (out of 173) and thus an outcome of a fixed time approach is easily achievable and the hurdle will likely be  $\frac{3}{4}$  of the Parties (62) present in 1995. The Parties are masters of their Convention and the rules of procedure allow for a vote to finally resolve the question.

Second, the Basel Ban Amendment is already a great success story, as mentioned earlier, in that even before global entry into force, 32 of the 39 countries it applies to have already implemented it in a legally binding manner. Further, as ratifications amass, slowly perhaps, but most surely, (last year saw 5 new ratifications in Chile, Ireland, Italy, Kenya and the Republic of Moldova), Annex VII countries would be legally suspect if sending wastes to these countries whether or not they had officially reported the desired prohibition to the Basel Convention Secretariat. Thus even without entry into force, the Ban Amendment has great force and it increases with each ratification.

However, any signal given by any body, that the Ban Amendment's multiple and vital objectives can not be fulfilled, dangerously harms its eventual success.

Proposals, for example, that simply seek to better implement the original Basel Convention, something that should be done now in any event, but do not address the *raison d'être* for the Basel Ban are inappropriate and send a dangerous signal that the ban's objectives can be achieved by the original convention. They cannot be. To assert otherwise undermines the Basel Ban entry into force effort by deeming the Ban Amendment somehow unnecessary.

Further, ideas that seek facility-based standards fail to address the entire scope of Basel Ban objectives and are based on the false assumption that ESM is achieved at the facility level only and does not involve the entire lifecycle of products and wastes, or include mechanisms necessary to support and ensure technologies to operate optimally and in a manner protective of human health and the environment.

The following ideas derived from the "Way Forward" paper fall into these categories and do not so much complement and assist in implementing the Ban as they propose alternatives to it, which fall far short of its original objectives. In this context, they are seen as dangerous.

**Swiss-Indonesian CLI Proposals that too narrowly define ESM (e.g. as facility based):**

- Defining standards / criteria and making available information about standards;
- Ensuring accountability and compliance;
- Internal measures by the facility, including environmental management systems, measurement and control, record keeping;
- Measures by external actors, e.g. inspections by enforcement officers;
- Developing an international independent certification scheme.

**Swiss-Indonesian CLI Proposals that simply call for what the Basel Convention already requires:**

- Linking standards of ESM to TBM;  
  
Linking ESM standards to TBM requirements might strengthen and clarify the Convention by ensuring that waste movements are minimized and take place only under high standards of management;
- Ensuring that vulnerable countries do not receive wastes that they do not want;

- Highlighting the right of countries to prohibit the import of hazardous wastes (Art. 4);
- Improving and facilitating the mechanism through which such prohibitions are notified;
- Encouraging countries which prohibit the import of hazardous waste to provide the SBC with full list of the hazardous wastes covered by the prohibition;
- Facilitating take-back obligations (Art. 8 & 9);
- Strengthening the implementation of the notification procedure for national definitions of hazardous waste (Art. 3);
- Measures to improve enforcement of the Convention;
- Measures for capacity building.

These reminders that certifications and standards can be a useful tool or that the Convention should be better implemented and complied with, would perhaps be appropriate in the “Way Forward” document were it also to include actual mechanisms and ideas for achieving the objectives of the Ban and achieving its entry into force. The fact that these ideas are glaringly *omitted* makes the entire exercise suspect. The message instead appears to be that the Ban may not be necessary if we just do these other things --even though the other things proposed do not fulfil the known objectives of the Ban. This messaging plays into the hands of the wishes of the minority of countries wishing to prevent the Ban from ever entering into force.

In the next section BAN lists some of the ideas glaringly missing from the “Way Forward” Paper. We submit them as recommendations.

## **V. Recommendations – a True Way Forward to Achieve the Ban and its Objectives**

1. Conduct widespread promotion of the Basel Ban for all countries, but in particular the seven Annex VII countries that so far have failed to implement it, providing information packages and media for parliamentarians on its importance from the standpoint of sustainability, economic, global governance, human rights and diplomacy.
2. Assist countries in the mechanics of Ratification and Deposit.
3. Persuade those non-Annex VII countries that have ratified the Ban Amendment to implement it in National legislation, providing model legislation to do so.
4. Persuade those non-Annex VII countries that have ratified the Ban Amendment to notify the Secretariat that they possess a national import ban for all hazardous wastes.
5. Encourage a vote on the question of Article 17, paragraph 5 to resolve the manner by which Amendments should enter into force.

6. Better enforce the Party to non-Party ban to apprehend hazardous waste exports coming from non-Parties (e.g. the USA) to Parties.
7. Conduct a study of the totality of externalities involved in the trade in hazardous wastes from Annex VII to non-Annex VII countries to provide true data on the economic distortionary effect of waste trade and its true costs to importing countries.
8. Conduct a study on the effects of cost internalization should the Ban go into universal force.
9. Conduct a study on the disproportionality of toxic impacts inflicted on developing countries due to cost externalization via globalization and the human rights implications of such impacts.
10. Promote certification programs for recyclers and generators of waste that include the Basel Ban Amendment and the Basel Convention in their standards.

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